

AGENDA ITEM

701 SEPTEMBER 2017

DATE: September 1, 2017

TO: Members, Board of Trustees

FROM: Saul Bercovitch, Office of General Counsel

SUBJECT: MOU with State Bar Foundation: Affinity and Insurance Program Administration

EXECUTIVE SUMMARY

The State Bar sponsors several affinity and insurance programs, offering discounts and other benefits to licensed California attorneys. The State Bar derives revenue from and administers these programs. Senate Bill 36 (Jackson), the pending State Bar fee bill, provides that the State Bar may transfer administration of these programs to the California Bar Foundation, if approved by the Board of Trustees and the California Bar Foundation. Senate Bill 36 further provides a formula for distribution of the revenue received from these programs. The State Bar wants to avail itself of the opportunity to transfer administration of these programs to the California Bar Foundation, a transfer which aligns with the fee bill and the State Bar's revised structure which is squarely focused on its public protection mission. In order to effectuate that transfer, the State Bar needs to enter into a Memorandum of Understanding ("MOU") with the Foundation. This Agenda Item lays out the essential terms and conditions of the proposed MOU. We expect the Foundation Board to take up this matter in mid-September. Assuming the Foundation Board approves, staff would like flexibility to negotiate and execute an MOU quickly. As a result, we are asking for approval of key MOU provisions at this time.

BACKGROUND

Affinity and Insurance Programs

The State Bar currently sponsors the following programs:

Affinity Programs

Sponsored Partner / product offered

- Bank of America / banking and credit cards
- Clio / law practice management in the cloud
- Hertz and Dollar / car rentals
- Lenovo / computers and related products
- OfficeMax / office supplies

- UPS / shipping

Insurance Programs

Type of Insurance / Broker / Carrier

- Accidental Death and Dismemberment / Mercer / VOYA
- Business Office Package / Mercer / The Hartford
- Disability / AI&PS / Ameritas
- Life / Mercer / American General Life
- Long Term Care / AI&PS / Mass Mutual
- Healthcare / Mercer and Heffernan / Two brokers only, no designated carrier
- Professional Liability / Mercer / Arch Insurance Group
- Workers Compensation / Mercer and Barney & Barney / NOVA Casualty

The California Bar Foundation

The California Bar Foundation ("Foundation") was created in 1990 as the Foundation of the State Bar of California. The Foundation was created as a supporting organization to the State Bar under section 509(a)(3) of the Internal Revenue Code to assist in carrying out the charitable, educational, and public benefit purposes of the State Bar.

On May 22, 2014, the Board of Directors of the Foundation voted to change the Foundation's legal status as a 509(a)(3) supporting organization of the State Bar. Subsequently, the Foundation's Board voted to amend the Foundation's Articles of Incorporation and Bylaws to change its corporate structure so that it would be an independent non-profit public benefit corporation. The amended Articles of Incorporation eliminated the provision that provided that the sole purpose of the Foundation is to carry out the charitable, educational and public benefit purposes of the State Bar, and broadened the mission of the Foundation to include any allowable exempt purposes under section 501(c)(3) of the Internal Revenue Code. On July 18, 2014, the Board of Trustees approved these amended governance documents.

The Foundation's mission is to build a better justice system for all Californians. The Foundation's change in corporate structure did not impact its continuing support for the goals of the State Bar, and the Foundation has continued to support projects that advance the missions of both the Foundation and the State Bar.

The fee bill

Senate Bill 36, as most recently amended on July 20, 2017, adds a new Section 6141.3 to the Business and Professions Code. That Section addresses the insurance and affinity programs, allocation of revenue received from these programs, and administration of these programs. New Section 6141.3 provides:

6141.3. (a) Except as provided in subdivision (b), the State Bar shall provide offers of discounts and other benefits to active and inactive members of the State Bar, including, but not limited to, insurance and affinity programs. Any revenue generated by these programs shall be used as follows:

(1) The revenue received from the affinity programs shall support the programs of the California Bar Foundation.

(2) (A) For all other revenue received from January 1, 2018, until December 31, 2018, 50 percent of the revenue shall be used to assist the Association in transitioning to an independent entity, 25 percent of the revenue shall be distributed to qualified legal services projects and support centers as provided in Section 6216, and 25 percent shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(B) For all other revenue received after December 31, 2018, 50 percent of the revenue shall be distributed to qualified legal services projects and support centers as provided in Section 6216, and 50 percent of the revenue shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(b) Notwithstanding subdivision (a), if approved by the board of trustees and the California Bar Foundation, the State Bar may transfer administration of the programs offering discounts and other benefits to active and inactive members of the State Bar under subdivision (a) to the California Bar Foundation provided that any revenue received, less the administrative costs of the California Bar Foundation in operating the program, shall be distributed as follows on and after January 1, 2019:

(1) All of the revenue received from the affinity programs shall be kept by the California Bar Foundation, which shall distribute 50 percent of that revenue to support the programs of the California Bar Foundation and 50 percent of that revenue to qualified legal services projects and support centers as provided in Section 6216.

(2) For all other revenue received, 50 percent of the revenue shall be kept by the California Bar Foundation, which shall distribute 50 percent of that revenue to support the programs of the California Bar Foundation and 50 percent of that revenue to qualified legal services projects and support centers in accordance with the formula provided in Section 6216, and 50 percent of the revenue shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(c) Given the public protection mission of the State Bar, the Legislature finds that it would be inappropriate for the State Bar to administer the program on a long-term basis. Therefore, should the program continue to operate after December 31, 2018, it is the intent of the Legislature that the program be administered by an entity other than the State Bar.

DISCUSSION

The MOU between the State Bar and the Foundation

In order to implement the transfer of the administration of the affinity and insurance programs, the State Bar needs to enter into an MOU with the Foundation. The essential terms and conditions of the proposed MOU are set forth below.

Administration of the programs

The MOU will set forth the Foundation's duties and responsibilities relating to administration of the programs, which will include:

- Assessing the effectiveness and productivity of the programs, identifying areas of potential change, and evaluating potential renewal of each program.
- Proposing changes in existing programs, recommending actuarial and other consulting studies as may be needed.
- Engaging in audits and reviews necessary to ensure both the economic viability of the programs and the availability of the programs to the broadest range of California attorneys.
- Considering premium rates, benefits, limitations, exclusions and other contract provisions in relation to the needs of California attorneys generally as well as the need to maintain the economic viability and stability of the programs.
- Interacting with sponsored business partners, brokers, and insurance carrier representatives of the programs to anticipate and implement program changes, coverages, and other matters that may respond to the needs of California's attorneys and precipitate additional growth of the programs, consistent with the economic stability of the programs.
- Overseeing and interacting with sponsored business partners, brokers, and insurance carrier representatives of the programs to ensure the broadest dissemination of information regarding the programs, the ease of applying for the programs, and other steps that may be necessary or appropriate to precipitate program growth consistent with the economic stability of the programs.
- Undertaking activities as may be necessary or appropriate to advocate with the underwriter on behalf of attorneys desiring to be included in the professional liability insurance program or those who may be declined.
- Serving as the main point of contact for the customer (the California attorney). Addressing questions, providing clarity on the offerings, and assisting in determining whether State Bar program benefits are able to meet a prospective customer's needs. Serving as liaison between the customer and the affinity and insurance partners for any issues that need to be escalated, and working with the designated affinity and insurance partner contacts to monitor responses to the customers and resolution of any issues.
- Interacting with sponsored business partners, brokers, and insurance carrier representatives brokers of the programs to assess customer satisfaction levels.
- Engaging in efforts to market the programs, in coordination with the State Bar. Developing a strategic marketing plan and drafting language for promotional material. Promoting the programs on the Foundation's website and in other appropriate media.
- Reviewing marketing literature for all programs on an ongoing basis.

- In collaboration with the State Bar, providing oversight of each affinity and insurance partner's co-branded web pages, to which the Calbar Connect site links.

Creation of an oversight committee

Under the MOU, the Foundation will create a committee to oversee the ongoing administration of the affinity and insurance programs. The State Bar will be entitled to appoint one member to serve on that committee.

Training and support

Under the MOU, the State Bar will provide training and support for the Foundation's administrative duties and responsibilities.

State Bar oversight of direct contractual relationships

Under the MOU, the State Bar will continue to maintain oversight of its direct contractual relationships with the sponsored partners, brokers, and carriers. This will include tracking revenue generated for the State Bar under the terms of the various contracts, and ensuring compliance with the terms and conditions of each contract. Where possible, consistent with the terms and conditions of the State Bar's existing contracts, the State Bar will transfer direct contractual relationships to the Foundation.

Revenue

Under the MOU, the State Bar will provide periodic payments to the Foundation, consistent with the statutory formula governing allocation of the revenue received from the affinity and insurance programs.

No competing programs

Under the MOU, the Foundation will not enter into any affinity or sponsorship arrangements that compete with the State Bar affinity or insurance programs.

State Bar freedom to contract

Under the MOU, the State Bar will be under no obligation to continue or renew any existing affinity or insurance agreement, except as required by the terms of any such existing agreement.

Other standard terms and conditions

The MOU will contain other standard contractual terms and conditions, which may include provisions covering:

- Length of the agreement
- Renewal
- Termination
- Proprietary and intellectual property rights

- Conflict of interest
- Dispute resolution
- Subsequent changes or amendments

FISCAL/PERSONNEL IMPACT

The fiscal impact of the MOU itself is negligible. The fiscal impact of the fee bill provisions as related to affinity and insurance program revenue redirection is significant, estimated to reflect a \$1.5 million reduction to the 2018 State Bar budget.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

2017-2022 State Bar Strategic Plan

Goal 1: Successfully transition to the “new State Bar.”

Objective (c): Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

STAFF RECOMMENDATION

Staff recommends that the Board of Trustees adopt the following resolution:

RESOLVED, that the Board of Trustees approves the transfer of the administration of the affinity and insurance programs from the State Bar to the California Bar Foundation; and it is

FURTHER RESOLVED, that the Board of Trustees authorizes staff to enter into a Memorandum of Understanding with the California Bar Foundation, consistent with the terms and conditions set forth in this Agenda Item.